Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

Comments of

Alaska Communications Systems Group, Inc.

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Alaska Communications Systems Group, Inc., on behalf of its operating subsidiaries ("ACS"),[1] hereby submits these comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") issued in the above-captioned proceedings regarding the universal service contribution methodology.

I. Introduction and Summary

The current universal service contribution methodology is long overdue for reform. The contribution base, consisting of interstate and international end-user revenues for telecommunications services, relies on increasingly antiquated jurisdictional and service distinctions. Modern communications technologies transcend historical concepts of jurisdictional separations and regulatory classifications, making the Commission's existing contribution requirements difficult to apply and burdensome to administer. Moreover, as customer usage migrates to more modern services, the contribution base is shrinking. As a result, the quarterly contribution factor, computed to generate the necessary quarterly support funds, is spiraling out of control, distorting competition, raising customer ire, and fostering sustainability concerns.

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1 In this proceeding Alaska Communications Systems Group, Inc. represents four local exchange carriers, ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and

The Further Notice's detailed discussion of issues and options synthesizes nearly a decade of thoughtful consideration and analysis by countless telecommunications policy experts, both at the Commission and in the private sector. But, the sheer volume of questions posed in the Further Notice reveals a fundamental shortcoming: each of the proposals is far too complicated. Any of them would require prodigious resources to implement, both at the Commission, to fashion and refine policy decisions responding to each of the questions raised, and among contributors, to effect a transition to a new regime. Moreover, once complete, none of the proposals appears adequately to meet the Commission's goal to create clear simple rules that can be applied to new situations.

In these comments, ACS offers a simpler approach, based on three primary features. *First*, the Commission should retain its revenue-based approach. While the revenue-based approach has many shortcomings, it is familiar and, post-reform, can be more stable and require less maintenance than a system based on telephone numbers or connections. *Second*, the Commission should expand the revenue base to include all of the provider's revenue that is derived from services that incorporate an interstate telecommunications component, including regulated interstate and intrastate telecommunications services, information services (which are provided via telecommunications), broadband, wireless voice and data, and other services not yet classified by the Commission that incorporate a telecommunications component. *Third*, the Commission should provide a streamlined option for contributors to use in deriving such revenue from the gross revenue calculations already required for corporate reporting purposes, including an elective safe harbor deduction.

Further, to reduce costs of compliance, the Commission should adjust the contribution factor annually, and eliminate the quarterly Form 499-Q filings. The larger revenue base will minimize the risk of significant quarter-to-quarter fluctuations in contribution revenues, and these changes will reduce compliance costs by eliminating the need for four tariff filings and four Form 499-Q filings annually. Finally, the Commission should continue to permit providers to place an explicit line item recovery charge on customer bills, and clarify contributors' obligations to contribute based on services provided to government customers, and such customers' obligation to pay line item universal service recovery charges placed on their bills.

II. Discussion

A. The Commission Should Adopt Reforms that Simplify the Current System

1. The Current Universal Service Contribution Methodology Is Outdated and Too Complicated (Further Notice ¶¶ 22-27)

The Commission and industry alike recognize the need for a universal service contribution methodology that is simpler, fairer, more robust, and more competitively neutral than today's anachronism. Today's contribution methodology is a relic from a time when the problem of parsing revenue into narrow jurisdictional and regulatory boxes appeared to be manageable, and the result sufficiently clearly cut to satisfy the "equitable and nondiscriminatory" mandate of Section 254(d) of the Communications Act, as amended ("Communications Act"), 47 U.S.C. § 254(d).

The Further Notice summarizes well the many shortcomings of the current system, which have been apparent for many years. Particularly over the past decade, the Commission's current universal service contribution base, consisting of end user revenues derived from jurisdictionally interstate and international telecommunications services, has become tremendously complicated to administer, even as it has continued to shrink. Revenue from traditional regulated wireline "local" and "long distance" telephony, which have historically been subject to an established framework of service classifications and jurisdictional separations, has diminished, both overall, and relative to the explosive growth of services and providers that do not fall neatly within historical jurisdictional boundaries. Growth has shifted to wireless voice and data, Voice over Internet Protocol ("VoIP"), broadband, text messaging, and other services that in many cases supplant wireline voice telephony, as well as flat-rated bundles incorporating these services in addition to more traditional telecommunications services offerings. As cable Multiple System Operators ("MSOs"), VoIP providers, and other providers of services that substitute for, and share some functional similarities with, traditional telecommunications services, the jurisdictional boundaries and regulatory service classifications that once defined the current contribution base have blurred.[2]

Over the past decade, the Commission has addressed the resulting challenges piecemeal, creating a complicated patchwork system under which some services are "in," others are "out," and still others are in an uncertain regulatory limbo. Even services that are "in" are subject to various exemptions, exclusions, and safe harbors that, whatever their other benefits, add further layers of complexity. Each quarter, contributors must prepare a series of complicated calculations and regulatory filings that bear little relation to other regulatory or corporate reporting requirements. As but one illustration, the Internal Revenue Service's Form 1040 tax return encompasses the entire breadth of the Internal Revenue Code, hardly a model of brevity or simplicity, in one double-sided page. In contrast, the Commission's Form 499-A is eight pages long, the first three of which are consumed with establishing the identity of the filer. Each year, in addition to the Form 499-A, ACS must also file quarterly Form 499-Q reports covering 12

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[2] Further Notice at ¶¶ 18-20.

operating subsidiaries, as well as quarterly tariff filings necessary to adjust the level of its end user charges necessary to recover its universal service liabilities.

As a result, ACS incurs costs of compliance that are prodigious for a small carrier. To administer the current system, ACS must dedicate employee time to a broad array of universal service contribution compliance and administration issues, including preparing and filing the Form 499-A and 499-Q reports, ensuring timely contribution payments, preparing and filing quarterly tariff updates to adjust end user charges necessary to recover those contributions, ensuring proper billing, managing customer complaints related to those charges, and responding to inquiries, investigations, and audits from USAC. With so many pressing demands for capital improvements to the nation's communications infrastructure, economic challenges continuing to hamper consumers, and limited universal service funds available, the Commission should do everything in its power to simplify and streamline the contribution methodology, liberating financial and personnel resources for more productive use.

2. The Commission Should Act Now

Beyond the shortcomings of the current mechanism, and the heavy burdens of complying with today's outdated contribution rules, the Commission's reform process itself has taken its own toll. Almost since its inception, the Commission has been questioning the current methodology. Since 2000, the Commission has sought comment on broad proposals for reforming the universal service contribution methodology reform over a half-dozen times,[3] *not*

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[3] *See, e.g., Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan (NBP Notice # 19)*, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, DA 09-2419, 24 FCC Rcd 13757 ¶ 2 (2009); *High Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475 (2008);

including numerous other examinations of the proper treatment of revenue from various specific services under the existing regime. These numerous rounds of comments with little definitive Commission action have imposed significant regulatory costs on contributors, who are required repeatedly to evaluate and plan for various potential outcomes, and more generally from the legal uncertainty and customer confusion that accompanies such a long period of doubt.

ACS strongly urges the Commission quickly to take long-overdue, decisive action to resolve the issues discussed in the Further Notice. Many of the issues raised in the Further Notice have been thoroughly debated in the Commission's earlier proceedings. While ACS appreciates the Commission's thoughtful examination of the individual complexities arising under each of the proposed alternatives reflected in the NPRM, the Commission and industry would be best served if the Commission were at least to establish the framework of its chosen reform, and handle refinements as necessary is subsequent rulemaking or waiver proceedings. Continued delay harms the industry, USAC, consumers, and the Commission alike, raising compliance costs, consuming regulatory resources, and endangering the sustainability of universal service, as the funding stream becomes increasing precarious.

Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518 ¶ 65 (2006); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33, 20 FCC Rcd 4685 ¶ 44 (2005); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 01-145, 16 FCC Rcd 9892 ¶¶ 17-30 (2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, 16 FCC Rcd 9610 ¶ 124 (2001); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking and Order, FCC 00-359, 15 FCC Rcd 19947 ¶¶ 8-30 (2000).

B. ACS Concurs that the Commission Has Authority to Create a Broad Contribution Base Founded on Revenues

ACS endorses the goals for reform that the Commission articulated in the Further Notice, specifically to create a contribution methodology that is:

> ***Efficient,*** *i.e.*, based on clear simple rules that can be applied to new situations;
>
> ***Fair,*** *i.e.*, based on competitively neutral rules that treat similar or substitutable services in a similar manner; and
>
> ***Sustainable,*** *i.e.,* dynamic enough to ensure a stable contribution base.[4]

In order to do so, ACS urges the Commission to interpret its Section 254(d) authority in a broad and inclusive manner, and to implement a contribution methodology that relies, to the greatest extent possible, on records and calculations that contributors already must prepare for other corporate purposes. Specifically, as discussed below, ACS believes that the Commission should require each provider of interstate or international telecommunications to base its universal service contributions on its gross annual revenues, with a safe harbor exclusion to account for revenue from non-assessable operations, such as wholesale revenues and non-telecommunications offerings.

1. The Commission Has the Statutory Authority to Require Contributions from All Providers of Services that Incorporate Interstate or International Telecommunications (Further Notice ¶¶ 28-35)

Section 254(d) of the Communications Act requires all interstate telecommunications carriers to contribute to universal service and permits the Commission to impose contribution obligations on "other provider[s] of interstate telecommunications . . . if the public interest so

[4] Further Notice, at ¶¶ 23-25.

requires."[5] Under the plain language of the statute, therefore, the Commission must only make a public interest determination that such contributions are in the public interest in order to broaden the contribution base in this manner.

ACS urges the Commission to interpret the statutory terms, "provider" and "interstate telecommunications," in a broad and inclusive manner. Such an approach would be consistent both with the statutory language and the Commission's goals to achieve reform that creates a sustainable contribution base. No matter what contribution base the Commission ultimately chooses, the Commission's sustainability goal requires it to be large and growing. The best way to achieve this result is to establish a contribution base that includes as many contributors and services as possible.

ACS believes that Commission's existing interpretation of what it means to be a "provider" of telecommunications need not be revisited. The Commission's existing determination that a supplier may "provide" telecommunications within the meaning of the statute, even without offering telecommunications as a standalone retail service is not only reasonable, but has been upheld by the United States Court of Appeals for the D.C. Circuit.[6] The statutory definition of "telecommunications"[7] encompasses, at a minimum, common carriers, private carriers, and information services providers. All of these services may

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5 47 U.S.C. § 254(d).

6 *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) ("[W]e have little trouble concluding that the word 'provide' is sufficiently broad to encompass the Commission's interpretation" that it "include[s] the act of supplying a good or service as a component of a larger, integrated product.").

7 The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50).

incorporate a telecommunications component in addition to other functionalities, and ACS believes that the Commission can and should subject such providers to universal service contribution obligations based on its permissive Section 254(d) authority.

2. The Commission Should Adopt a Broad Definitional Approach in Establishing the Scope of Contribution Obligations (Further Notice ¶¶ 74-94)

The Commission's experience under the current system reveal the substantial challenges that the Commission would face in attempting to provide case-by-case guidance. The Commission's efforts over the past decade to determine the contribution obligations associated with wireless services, VoIP, broadband Internet access, and other new and emerging services, together with the substantial list of additional services discussed in the Further Notice illustrate, above all, that the Commission should not undertake the routine responsibility for providing and refining case-by-case guidance of this type. Continuing advances in technology, together with variations, small or large, in the way in which individual providers may deliver similar services, make any such exercise daunting at best.

Moreover, there is little need for such an exercise. As discussed in the Further Notice, at ¶ 73, the Commission already has prescribed a non-exclusive list of services that are within the universal service contribution mandate, 47 C.F.R. § 54.706. While the list is unobjectionable, neither is it especially helpful in resolving ambiguities arising in the modern telecommunications industry. It includes interstate telecommunications services that are unquestionably within the mandatory portion of Section 254(d), but also services (such as telegraph and telex services) that represent minor portions at best of today's contribution base. In addition, it includes categories, such as "video services" and "satellite services" that, today, could be read to encompass services generally considered not to create a contribution obligation for providers.

Moreover, with an appropriate broad definitional mandate, it should become unnecessary for the Commission to issue a rule or order governing the treatment of each an every service offering. Thus, ACS generally supports the Commission's proposal to adopt a rule broadly imposing contribution obligations on providers of interstate and international telecommunications. The Further Notice proposes a broad rule that

> *Any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless), directly or indirectly through an affiliate, to end users.*

ACS believes that this proposal is adequate as a general rule, and that limited, if any exceptions, are warranted. With a broad contribution base, the universal service assessment on any one service will be small, and will apply equally to substitute services. These factors, in turn, will advance the Commission's fairness goal, ensuring that the contribution rules are competitively neutral, impose similar contribution obligations on substitutable services, and therefore meet the statutory requirement for the contribution mechanism to be "equitable and nondiscriminatory," 47 U.S.C. § 254(d). Moreover, by ensuring that the contribution obligation associated with any particular service is small, the Commission will ameliorate the risk that the contribution obligation could impede deployment or uptake of specific services, such as broadband Internet access, *e.g.,* Further Notice at ¶ 84. Finally, in light of the Commission's decisions to harness universal service support mechanisms to drive broadband deployment, it is only appropriate that revenues from services provisioned over these new platforms, in addition to the broadband platform itself, be included in the contribution base.

C. The Commission Should Continue to Base Contribution Obligations on Provider Revenue (Further Notice ¶¶ 98-218)

1. Despite its Flaws, a Revenue Basis is Superior to the Other Choices

Despite the considerable, well-recognized problems plaguing the current contribution base, ACS believes that the Commission should continue to rely on provider revenues in determining contribution obligations under the broad definitional approach endorsed above. While revenues are a decidedly imperfect solution, reforms aimed at simplifying and updating the current revenue-based methodology offer the best opportunity to build on the Commission's existing body of experience, shorten the learning curve for providers, USAC, and Commission staff alike, and establish a robust, sustainable contribution base for the telecommunications industry as a whole.

In addition to being the most sustainable, a revenue-based methodology also best achieves the Commission's fairness goal. Because universal service contribution obligations are, ultimately, paid out of provider revenue, a contribution base that keeps these contributions proportionate to revenue is superior to one based on another metric. In broad strokes, provider revenue associated with assessable services represents an approximation of the relative value that the market places on such services and, in turn, the capacity of such services to bear contribution obligations.

Numbers- or connections-based methodologies, in contrast, will create complicated transition issues and require the Commission essentially to start once again from scratch in addressing questions large and small as to how the new system would treat specific services. The Further Notice anticipates and articulates dozens of such issues; undoubtedly many more would arise in the wake of any order establishing a contribution methodology based on such issues. Further, revenues, on the whole, offer a more sustainable basis for assessing contributions than either of those alternatives. Today, a host of services, such as Skype, Apple's FaceTime, one-way VoIP, and other services enable voice and video communication that, in many cases, do not rely on traditional North American Numbering Plan telephone numbers. As these services continue to grow, the Commission will inevitably be faced with the question of whether or when to incorporate them into a numbers-based methodology.

Further, a numbers-only methodology is unlikely to achieve the Commission's fairness goals. At one end of the spectrum, many services, such as prepaid wireless, wireless family plans, pagers, and dial-up Internet access, make use of numbering resources that is disproportionate to the revenue that they generate. At the other end, there are also many services, such as broadband Internet access and high-capacity business services, that make little or no use of telephone numbers whatsoever and, therefore, would largely escape contribution obligations.

Similarly, for a connections-based methodology, the Commission would be faced with the ongoing responsibility for evaluating and updating the speed levels that define the connections tiers. In addition, the Commission would need to resolve difficult questions of whether to base contribution obligations on advertised maximum connection speeds, the speed of the service as actually delivered, capacity used by the customer, or some other metric. It would be difficult or impossible for smaller carriers, such as ACS, continuously to measure the connection speed each individual customer actually receives over the course of each billing period, especially because such speed can vary, not just with network conditions, but also with the equipment and conditions at the customer's premises. Furthermore, it would be necessary to change the federal universal service charge appearing on the customer's bill, potentially on a monthly basis. Such a process would need to be done manually, as ACS lacks billing systems that could perform such calculations automatically on a monthly basis.

2. The Commission Should Base Contribution Obligations on Gross Provider Revenues (Further Notice ¶¶ 101-142)

While ACS endorses a revenue-based methodology, the Commission should undertake substantial reforms to streamline and simplify today's overcomplicated system. Having determined that all providers of interstate and international telecommunications should contribute to universal service, and determined that that contribution should be based on revenues, the Commission should adopt a contribution methodology that builds, to the greatest extent possible, on records and calculations that contributors already must prepare for other corporate purposes.

Specifically, the Commission should adopt a contribution requirement based on the gross revenue calculations already required for corporate reporting purposes. ACS believes that, in light of changes to the telecommunications industry since 1999, the Commission should revisit the interpretation of its authority under Section 254(d) espoused by the United States Court of Appeals for the Fifth Circuit in the *TOPUC* decision.[8] In that decision, the Fifth Circuit held that the Commission was prohibited from assessing universal service contributions based on a percentage of each carrier's combined interstate, international, and intrastate telecommunications services revenues. ACS believes that the Fifth Circuit wrongly decided the *TOPUC* case and that, in any event, changed circumstances since 1999 require the Commission to revisit its

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8 *Texas Office of Public Util. Counsel v. FCC*, 183 F. 3d 393 (5th Cir. 1999) ("*TOPUC*").

interpretation of the interaction between Section 2(b) and Section 254(d) of the Communications Act.

First, in *TOPUC*, the Fifth Circuit primarily evaluated the Commission's exercise of its authority under the portion of Section 254(d) relating to mandatory contributors, *i.e.*, providers of interstate telecommunications services. The exercise of this power involves fundamentally different regulatory considerations than would the exercise of the Commission's permissive power to extend universal service contribution obligations to providers of interstate telecommunications. "Telecommunications services", as defined in the Communications Act, 47 U.S.C. § 153(53), involve telecommunications offered on a common carrier basis. Such services are subject to comprehensive regulation by the Commission at the interstate level and by state public utility commissions at the state level. At least with respect to wireline providers, telecommunications services are subject to specific Part 32 accounting, Part 64 classification between regulated and non-regulated services, and Part 36 jurisdictional separations rules, meaning that wireline telecommunications carriers, at a minimum, have a relatively well-defined process for allocating revenues and costs in this manner.

Unlike in 1999, a substantial and growing portion of telecommunications provider revenue today comes from services that (a) constitute information services or other uncategorized services that incorporate telecommunications functions, but that have not been found to meet the definition of "telecommunications services" in the Communications Act; and (b) are therefore not subject to the traditional system of jurisdictional separations applicable to wireline telecommunications services. To date, the Commission and providers alike have been forced to devise *ad hoc* processes that, at best, merely approximate an apportionment between the state and federal jurisdictions that is not covered in the jurisdictional separations rules and that providers would not otherwise need to perform. These difficulties will grow more cumbersome and complex, even for providers of regulated telecommunications services as the proportion of provider revenue from services that incorporate telecommunications, but that are not "telecommunications services," grows. Already, as the jurisdictional complexity of services has increased, it has become increasingly difficult to assign services (and associated revenues) to the state or interstate jurisdiction for universal service contribution purposes. As a result, the Commission's rules are increasingly prone to dispute, and carrier reports allocating revenues portray far more precision than is possible given the existing tools.

The difficulties with assigning traffic to the state or interstate jurisdiction in cases where there is no established process for doing so can already be seen in the Commission's treatment of wireless and interconnected VoIP services. For example, even to the extent that Commercial Mobile Radio Service ("CMRS") is considered a telecommunications service, Section 332(c)(3) of the Communications Act has long prohibited state public utility commissions from regulating CMRS rates or entry.[9] As a result, when it issued its rules requiring CMRS providers to contribute to universal service, the Commission permitted each such provider to estimate the interstate portion of its telecommunications revenues in good faith, and to document the methodology it chose to arrive at its estimate. The Commission also decided to create a safe

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[9] 47 U.S.C. § 332(c)(3) ("[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.").

harbor for CMRS providers of 15 percent of revenues, based on Commission Dial Equipment Minutes of Use ("DEM") weighting data showing that roughly 15 percent of overall minutes of wireline traffic were interstate in nature.[10] Thus, although the Commission required CMRS providers to allocate their revenues between the state and interstate jurisdictions, the Commission gave them no concrete guidance as to how to do so, and established a safe harbor with only minimal supporting discussion of the extent to which the underlying metric – wireline DEM weighting data – might accurately predict jurisdictional cost causation for wireless services.

By taking such action, the Commission may have helped ensure that the contribution obligation on CMRS carriers remained "equitable and nondiscriminatory" under Section 254(d). But, because state public utility commissions do not regulate rates (or, by extension, costs) of CMRS carriers, however, and because there are no applicable jurisdictional separations rules, the extent of any Section 2(b) statutory limitation is unclear.

Any Section 2(b) impact on the Commission's permissive authority to impose contribution obligations on providers of interstate telecommunications is similarly limited. "Interstate telecommunications" includes a host of private carriage and information services that the Commission does not regulate under Title II. There is no established jurisdictional boundary to distinguish "intrastate telecommunications" from "interstate telecommunications," other than those Part 32, Part 64, and Part 36 rules that apply to traditional wireline telecommunications services. But, many costs (and associated revenues) associated with "telecommunications" are

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[10] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 98-278, 13 FCC Rcd 21252 (1998).

allocated to non-regulated activities under Part 64, and are therefore never subject to Part 36 jurisdictional separations rules. Any Section 2(b) constraint on the Commission's authority is therefore theoretical at best.

Second, as the Commission recognizes, Section 254(d) appears to permit the Commission to structure contribution obligations in a variety of ways that do not rely solely on interstate revenues. But, connections- or numbers-based methodologies have no particular advantage over revenue-based methodologies under Section 254(d). Flat-rated per-number or per-connection charges levied on a facility that is capable of jointly delivering interstate and intrastate telecommunications are legally indistinguishable from charges based on total interstate and intrastate revenue. Assessing a flat-rated charge per telephone number or per connection based solely on its capability to be used in interstate communication, even if its actual use involves little or no jurisdictionally interstate traffic, is functionally equivalent to an assessment based on combined revenue, because in either case, the provider's contribution obligation does not vary with the relative amounts of jurisdictionally interstate traffic placed on the connection.

Assessments based on intrastate and interstate revenue from services incorporating a telecommunications component are legally sound for the same reasons as those underpinning such alternative methodologies. Like the underlying facilities, there is no readily apparent way to apportion revenues from services that may incorporate interstate and intrastate telecommunications between the respective jurisdictions. In economic terms, most intrastate and interstate telecommunications are joint products that both result from the provider's delivery of service. For example, a broadband Internet access connection can be used to store and retrieve data from virtually anywhere in the world including, in some cases, from within the U.S. state where the user is located. In many cases, the precise location of the computer supplying the data is little more than happenstance, as many popular web sites are mirrored at multiple locations or cached locally by the user's Internet service provider.

Even if such an allocation of usage were possible or meaningful, it would not inform the Commission as to an appropriate allocation of the provider's revenue. Because most of the costs of the network that jointly delivers intrastate and interstate telecommunications are fixed, there is no means of allocating these costs between the two products, *i.e.*, intrastate and interstate telecommunications, that is economically more efficient than any other. Without such a means of allocating costs, there is similarly no means of allocating revenues that is economically more efficient than any other, either between telecommunications and non-telecommunications offerings, or between intrastate and interstate services.

Indeed, similar considerations underpin today's jurisdictional separation of regulated network costs. For decades, the costs of the local loop, one of the single largest items of regulated cost, has been allocated in a fixed ratio of 75 percent to the state jurisdiction and 25 percent to the interstate jurisdiction, largely based on the same considerations relating to the allocation of fixed costs discussed above.[11] Similarly, the jurisdictional separation of many other items of cost has been frozen for many years, effectively creating a fixed ratio for those costs as well.[12] With revenues subject to jurisdictional separations on the same basis as costs, period-

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11 47 C.F.R. § 36.154(c).

12 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, FCC 11-71, 26 FCC Rcd 7133 (2011) (extending a freeze that has been in place since 2001). Indeed, not only has the Commission maintained the freeze since 2001, it recently suggested in light of this lengthy freeze that many carriers may no longer even have the ability to perform jurisdictional separations functions, even it they were required. *Id.*, at ¶ 14 ("If the Commission allowed the earlier separations rules to return to force, carriers would be required to reinstitute their separations processes even though many

over-period variation in the relative levels of state and interstate revenues is negligible. Given this lengthy freeze, any difference between the cost impact on a particular provider of assessing interstate revenues at a higher rate, on the one hand, and assessing combined revenues at a lower rate, on the other hand, appear negligible.

Third, it is clear that the Fifth Circuit in *TOPUC*, at 428, erred in stating that, "[t]here is no question that the amount of a carrier's universal service contributions will increase with the inclusion of intrastate revenues. This cost, even if recovered only through interstate revenues, still constitutes a 'charge in connection with intrastate service' under § 2(b)." Contrary to the Fifth Circuit's opinion, the demand for federal universal service support does not vary with the particular contribution methodology chosen to provide funding. Because the aggregate amount collected will not change, a larger contribution base merely would result in a lower contribution factor that reduces the burden on any one service. Because the relative jurisdictional separation of provider costs and revenues varies little from period to period, any individual provider's total contribution amount would remain similarly stable. Based on these considerations, the State Members of the Federal-State Joint Board on Universal Service have advocated broadening the universal service contribution base to include both state and interstate services.[13]

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carriers no longer have the necessary employees and systems in place to comply with the old jurisdictional separations process and likely would have to hire or reassign and train employees and redevelop systems for collecting and analyzing the data necessary to perform separations.").

[13] State Members of Joint Board CAF Comments at 121-24.

3. To Advance its Efficiency Goal, the Commission Should Establish a Safe Harbor Exemption for Wholesale and Non-Telecommunications Revenues (Further Notice ¶¶ 143-178)

ACS endorses a revenue-based contribution methodology that would assess all provider revenue from services that incorporate a telecommunications component, including regulated interstate and intrastate telecommunications services, information services (which are provided via telecommunications), broadband, wireless voice and data, and other services not yet classified by the Commission that incorporate a telecommunications component. Such a system will achieve the Commission's fairness and sustainability goals by broadly encompassing many services that are increasingly seen as substitutes in the market, but which are subject to disparate treatment today.

Nevertheless, as discussed herein, today's "ground-up" methodology for identifying and cumulating assessable revenues is overly burdensome and unnecessarily complicated. To reform the revenue-based system, therefore, ACS urges the Commission to adopt a "top down" system utilizing each provider's gross revenue calculations. From this top line, gross revenue number, each carrier would be permitted to deduct certain categories of revenue to establish its contribution base, as follows:

- Revenue derived from offerings that do not incorporate a telecommunications component; and
- Revenue from wholesale transactions, where a downstream provider will incorporate the services so purchased into retail services that incorporate an interstate telecommunications component;

By doing so, the Commission will avoid competitive distortions and ensure that it remains compliant with the "equitable and nondiscriminatory" mandate of Section 254(d).

By excluding revenue derived from offerings that do not incorporate a telecommunications component, the Commission will ensure that contribution obligations remain "equitable and nondiscriminatory" under Section 254(d). Providers that may have large non-telecommunications operations could otherwise find it prohibitive to enter the telecommunications market, if by doing so they would risk subjecting all corporate-wide revenue to universal service contributions. Similarly, by excluding wholesale revenues, the Commission would avoid duplicative assessments on resold services, which could distort competition between resellers and facilities-based providers.

While each provider should be free to calculate the amount of revenue it derives from services subject to these exclusions, the Commission should establish a "safe harbor" that would permit providers to streamline their calculations by deducting a prescribed percentage from their gross revenues, without further justification. While ACS lacks adequate information as to the relative mix of revenues prevailing in the industry adequately to determine what a reasonable exclusion percentage would be, it may be possible to determine such a figure from Form 499-A data, or other Commission records. To the extent possible, in order to ensure maximum streamlining benefits, the percentage should be set high enough to incentivize a substantial majority of telecommunications industry participants to utilize the safe harbor. In those limited cases where a provider believed that its proportion of wholesale or non-telecommunications revenue exceeded the safe harbor, it would be permitted to make the showing on a revised Form 499-A.

Further, as is the case today, ACS has no objection should the Commission decide to preserve a *de minimis* exemption and limited international revenue exemption (LIRE) analogous to those that exist today.[14]

D. The Commission Should Update its Administrative Processes to Reflect the Contribution Methodology Discussed Herein (Further Notice ¶¶ 342-359)

To further advance the Commission's reform goals, it should streamline its administrative processes to reduce contributors' costs of compliance. By doing so, the Commission will increase the fairness of the system by reducing the cost burden on small contributors, increase the efficiency of the system by reducing costs overall, and increase sustainability by permitting providers to direct resources toward the deployment of new facilities and services.

1. The Commission Should Streamline and Update the Form 499-A to Reflect the Methodology Discussed Herein and Eliminate the Form 499-Q (Further Notice ¶¶ 344-349)

To implement the methodology discussed herein, the Commission should overhaul the Form 499-A to reflect the revenue calculations necessary to establish the broader revenue contribution base defined above. To accomplish this task, and to keep the form up to date once it is completed, ACS supports the Commission's proposal for requiring the Wireline Competition Bureau to seek public comment on annual revisions, as discussed in the Further Notice, at ¶¶ 346-349.

With the larger overall revenue base, ACS believes that quarterly Form 499-Q filings should no longer be necessary. Once a carrier has established its revenue base in the annual filing, it should be permitted to maintain that revenue base for the duration of the year. Minor

[14] *See* Further Notice at ¶¶ 193-218.

fluctuations based on organic growth or evolving market conditions, will not be substantial enough, in the ordinary case, to warrant the administrative costs associated with quarterly filings.

As a less desirable alternative, the Commission could impose safeguards requiring an updated quarterly filing only if a contributor's quarterly corporate earnings report (for itself and all affiliates) were to reflect a change in the contributor's gross revenues that exceeds a specific threshold, say 25 percent, from a baseline amount. Such a baseline could either be the corresponding quarter the prior year or, if the Commission were to collect projections on Form 499-A, the projection for that quarter previously provided. This would protect both the contributor and the universal service fund from the effects of such large magnitude changes.

2. The Commission Should Update the Contribution Factor Annually (Further Notice ¶¶ 350-359)

Consistent with the changes to the Form 499 process discussed above, ACS urges the Commission to adopt a process for updating the contribution factor annually. With the larger contribution base proposed in these comments, and with updates coming annually in the Form 499, there should be no need to update the contribution factor quarterly.

The contribution factor is based on a combination of the revenue base and the forecast demand for universal service support. With annual updates to the contribution base coming in annual Form 499 filings, there should be no need to update the contribution factor to reflect changes more often than annually. Similarly, now that the Commission has established a budget or cap for the largest universal service support mechanisms, accurate annual demand forecasts should become possible.

The Revised Form 499-A should continue to be due April 1, but reflect revenues reported for the provider's most recent complete fiscal year ending on or before that date. The revised contribution factor would take effect July 1, and end user recovery charges could be adjusted as part of the annual access tariff filing. Such an annual filing would reduce providers' compliance costs currently associated with four quarterly tariff filings, in addition to reducing customer confusion resulting from quarterly changes, and the level of Commission staff resources devoted to administration of the contribution factor changes.

To the extent that the Commission believes that annual updates create a risk of shortfall, ACS urges the Commission to set the contribution factor at a rate that is projected to produce a small reserve during the initial year, subject to an annual true-up in subsequent years to maintain proportionality between contribution revenues and funding demand.

E. The Commission Should Continue to Permit Providers to Recover Contribution Amounts through Explicit Line Items on Customer Bills, and Clarify Its Universal Service Recovery Rules with Respect to Government Customers (Further Notice ¶¶ 387-410)

Transparency is the key to ensuring that universal service funding remains specific, predictable, and sufficient, but not excessive, as mandated by Section 254(b) of the Communications Act and the Fifth Circuit.[15] Indeed, the high explicit assessment rate on today's revenue base has served as an important and public bellwether signaling the need for reform. As such, the Commission should continue to mandate that the charge reflect the actual contribution obligation the provider incurs to serve the customer.

In reexamining its rules regarding provider recovery of universal service contribution costs from end users, ACS urges the Commission also to clarify the extent to which providers are permitted to recover such costs from government customers. ACS has repeatedly found that its

[15] *See* 47 U.S.C. § 254(b); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000).

government customers, particularly agencies of the federal government, frequently dispute their obligation to pay the federal universal service charge line items appearing on their bills.

ACS believes that the Commission's ruling on this issue should be informed by a discussion of whether a provider incurs a universal service contribution obligation when it provides otherwise assessable services to government customers, including federal government agencies. If a provider is exempt from contributing to universal service in connection with its provision of such services, then ACS agrees that no end user recovery is necessary. To the extent that the Commission finds that a provider must contribute to universal service based on its provision of such services, ACS requests that the Commission make clear the obligation of the government customer to pay universal service recovery charges assessed on its bill.

III. Conclusion

ACS believes that the universal service contribution reforms discussed herein best meet the Commission's reform goals of fairness, efficiency, and stability. ACS urges the Commission to adopt long-delayed reform of the universal service contribution mechanism in accord with these proposals forthwith.

Respectfully submitted,

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